THE SUPREME COURT OF THE STATE OF ALASKA

J.P. and S.P (Foster Parents)
Appellants,

vs.

State of Alaska, DHSS, G.C. (Mother), W.F. (Father), J.F (Child) And Sun'aq Tribe of Kodiak
Appellees.

Supreme Court No. S-18107

APPELLANT'S RESPONSE TO ORDER DATED JULY 9, 2021

Appellants ("J.P and S.P") appreciate this Court's invitation to provide further briefing. This memo is broken into four sections. The first section (A) addresses certain facts to be considered or established in the July 9, 2021 Orders of this Court. Section (B) addresses the doctrine of mootness and will argue that, because the Sun'Aq tribe never had proper jurisdiction over this case and over the parties, the case is not moot, and even if it did have jurisdiction, the lack of due process would render any orders issued by the tribal court void and therefore not moot. Section (C) addresses standing and why the Petersen's had standing in the prior case and have standing here. Section (D) addresses the public interest exception to the mootness doctrine.

A. Facts to be considered or established: July 9, 2021 Orders

1. J.F was taken from Alaska across the country to live with a *Non-Indian* family in New Mexico, not an Alaska Native family, as this Court's July 9, 2021 Order may contemplate (See, "extended family," July Order at (3)). J.F.'s known Alaska Native extended family members each *oppose* the move and want J.F. to stay in Alaska. The GAL

also opposed the move. Members of J.F.'s mother's family, who are in Alaska and are Alaska Native, want to adopt J.F. if J.P and S.P are unable to do so under ICWA. However, placement in Alaska was never considered before the Sun'Aq Tribal Court ordered J.F. to New Mexico on June 9, 2021.

2. No "resolution" or "agreement" between sovereigns (Sun'Aq tribe and the Tangirnaq Village) was ever produced to the trial court (See July 9, 2021 Order at 2, indicating there was a "resolution passed" between tribes).

3. The July 9, 2021 Order expresses empathy for J.P and S.P. However, it requires emphasis that this case is about J.F., who is 4 years old and was uprooted from his home, from his Alaska home state, and from his extended Alaska Native family. J.F. suffers loss of attachments that cannot be explained to him, confusion, psychological abandonment, and emotional trauma that will affect him for the rest of his life.

B. <u>The Case is Not Moot because The Sun 'Aq Tribe never had jurisdiction, and if it did, the lack of Due Process Renders any Orders Void and Not Moot</u>

As an initial matter, a case is only "moot" if it no longer presents a "present, live controversy, and the party bringing the action would not be entitled to relief, even if it prevails."[1] A live controversy exists here because on June 9, 2021, J.F.'s life-long foster family was coerced under threat of a tribal court order to deliver J.F. to the Anchorage Police Department and taken to New Mexico with a white extended family member he does not know. Appellants contend that granting them relief and returning this case to state court would not impede the sovereignty of the Sun'Aq Tribe because the Sun'Aq Tribe

[1] *In re Jacob S.*, 384 P.3d 758, 770 (Alaska 2016).

never had valid jurisdiction over this dispute. Moreover, even if the Sun'Aq Tribe had jurisdiction over this matter, this Court's review and return of this case to state court would still be proper because the Sun'Aq Tribal Court did not afford the parties sufficient due process.[2]

In *Starr*, this Court considered a similar custody proceeding concerning two Indian children pending in both the superior court and before a tribal council.[3] The *Starr* court held that because the tribal council failed to afford due process to the paternal grandparents when it granted adoption to the maternal grandparents, its substantive orders were not afforded full faith and credit.[4] When referring to Section 1911 of the Indian Child Welfare Act ("ICWA"), the *Starr* Court held that "[t]he statute does not require the state court to give absolute deference to a tribal court order regardless of the circumstances."[5]

Here, Appellants contend that the Sun'Aq Tribal Court failed to provide due process in the proceedings both prior to and following the superior court's transfer of jurisdiction. The June 9 hearing went forward even though court proceedings were still ongoing and notice of a pre-determined decision transferring the child to New Mexico resulted requiring enforcement from the Anchorage Police Department. No curing of the June 9, 2021 due process violations occurred even though a subsequent hearing took place on June 15, 2021 because the June 9 Order remained in effect, with Anchorage Police enforcement in effect, and proceeded without any person present to represent J.F.'s best interests (the Guardian

[2] *Starr v. George*, 175 P.3d 50 (Alaska 2008).
[3] *Id*. at 52-53.
[4] *Id*. at 57-58.
[5] *Id*. at 57.

ad Litem was expressly disinvited – although the biological parents were represented by state appointed attorneys). Such due process violations—independent from the jurisdictional arguments—warrant this Court's consideration of the merits of the due process arguments. To the extent that the Appellants may prevail on one or more of their due process claims, the case is not moot.

It is undisputed that the Sun'Aq Tribe has no connection to J.F. or to any other person in this case. Allowing the case to remain in state court would not require this court to "order the tribal court . . . to transfer jurisdiction of the child's proceeding back to state court" (July 9, 2021 Order 4), because the Tribal Court never validly obtained jurisdiction. While "Indian tribes are 'distinct independent political communities' . . . Congress has plenary authority to limit, modify or eliminate the powers of local self-government which the tribes otherwise possess."[6] In other words, "[m]odern tribal sovereignty is certainly not absolute[,]" but rather "depends on the intent of Congress."[7] The two tribes in this case—the Sun'Aq Tribe of Kodiak and the Tangirnaq Native Village—are two independent Indian Sovereigns, with separate and distinct authority. "A tribe's inherent sovereignty to adjudicate internal domestic custody matters depends on the membership or eligibility for membership of the child."[8] "Because the tribe only has subject matter

[6] *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56 (1978) (quoting *Worcester v. Georgia*, 6 Pet. 515, 559, 8 L. Ed. 483 (1832)).
[7] *John v. Baker*, 982 P.2d 738, 751 (Alaska, 1999).
[8] *Id.*

jurisdiction over the internal disputes of *tribal members*, it has the authority to determine custody **only** of children who are members or eligible for membership."[9]

As asserted above, no member or elder of the Tangirnaq Village signed the Transfer Petition, nor did Sun'Aq Tribe produce any "resolution" that the Tangirnaq Native Village delegated its sovereign authority to the Sun'Aq Tribal Court. Such a concept is inapposite to the federal government's recognition that each tribe is a separate and distinct sovereign.[10] As such, any resolution or order entered by the Sun'Aq Tribe void *ab initio* for lack of jurisdiction.[11]

Starr further demonstrated that even where a tribe conducts proceedings under a claim of jurisdiction, this claim alone does not prevent the state from hearing an appeal regarding errors in said proceedings. That said, even if this Court lacks "authority to order the tribal court . . . to transfer jurisdiction of the child's proceeding back to state court" (July 9, 2021 Order 4), it surely has authority to declare that jurisdiction was never validly transferred to the tribal court in the first place and instead always remained with the state court. Because state courts can retain jurisdiction without impeding the sovereignty of any tribe if a due process violation occurred, and because failing to do so violates the sovereignty of the Tangirnaq Native Village, this case is not moot.

C. <u>J.P and S.P have Standing under Alaska case law.</u>

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[9] *Id*. (emphasis added).
[10] *Santa Clara Pueblo*, 436 U.S. at 56; *Baker*, 982 P.2d at 759.
[11] See *Perry v. Newark*, 871 P.2d 1150, 1153-54 (1999) (holding that a decision made by a tribunal lacking jurisdiction may be considered void.)

This Court has repeatedly stated that "the basic requirement for standing in Alaska is adversity,"[12] and has shunned "a restrictive interpretation of the standing requirement, adopting instead an approach favoring increased accessibility to judicial forums."[13] Interest-injury plaintiffs need not have a great injury, as "an identifiable trifle is enough for standing to fight out a question of principle; the trifle is the basis for standing and the principle supplies the motivation."[14]

This case implicates both the Alaska's Child-In-Need-Of-Aid ("CINA") statutes (AS 47.10.005, *et seq*.) and the Alaska's civil custody statutes (AS 25.24.010—25.24.180; AS 25.20.060). Because Alaska's CINA statutes incorporate, in part, the civil custody statutes at AS 47.10.113(c), it follows that the standing requirements of Alaska's custody law should be applied. Also, the language of AS 47.10.113 –infers that "a person" need not be a biological parent nor extended family member.

This Court has consistently taken a broad approach to standing in custody cases. See, *Carter v. Brodrick*,[15] where this Court recognized that, where a stepfather has assumed the status of psychological parent, his stepchild, not a biological child, is subject to the jurisdiction of its marital custody orders. In *Buness v. Gillen*,[16] this Court reaffirmed *Carter* and held that "a non-parent who has a significant connection with the child has standing to assert a claim for custody" under AS 25.20.060. Thus, "a third party need not

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[12] *Trustees for Alaska v. State*, 736 P.2d 324, 327 (Alaska 1987) (citing *Moore v. State*, 553 P.2d 8, 24, n. 25 (Alaska 1976)).
[13] *Id.*
[14] *Wagstaff v. Super. Ct., Fam. Div.*, 535 P.2d 1225 & n.7 (Alaska 1975).
[15] 644 P.2d 850, 855 (Alaska 1982).
[16] 781 P.2d 985, 988 (Alaska 1989)

prove psychological parent status to have standing to bring a claim for custody or visitation."[17] However, this Court has also cautioned that foster parent intervention in CINA cases should "be the rare exception rather than the rule,"[18] and that a trial court may grant permissive intervention to foster parents under Alaska Civil Rule 24(b) only when "necessary to promote the child's best interest."[19]

This case involved *necessary* permissive intervention. J.P and S.P are psychological parents because of the lifelong (4.5 years) connection they share with J.F. which was cruelly and abruptly disturbed. After reunification efforts had failed and "pre-adoptive" placement was imminent, the undersigned filed an entry of appearance on behalf of J.P and S.P in the CINA case to protect J.F. from a detrimental move across the country that was predicted by an expert to cause J.F. psychological trauma and was not in his best interest. Accordingly, J.P and S.P intervened because, aside from the GAL, they were and still are the parties best positioned to communicate J.F.'s best interests.

J.P and S.P filed their written entry of appearance on March 5, 2021 and there were no contemporaneous written objections filed. At the March 10, 2021 pretrial conference for final permanency, J.P and S.P were present with counsel. At that hearing, the trial court informed the parties *that it was unnecessary* for J.P and S.P to file a written motion to intervene and that their participation regarding permanency for J.F. would be allowed.[20]

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[17] *Osterkamp v. Stiles*, 235 P.3d 178, 184, n.17 (Alaska 2010); accord *Dara v. Gish*, 404 P.3d 154, 161 (Alaska 2017).
[18] *State, Dep't of Hlth. & Soc. Svcs. v. Zander B.*, 474 P.3d 1153, 1164 (Alaska 2020).
[19] *Id.* at 1171.
[20] *See Log Notes*, March 10, 2021, Pre-trial scheduling Conference; 3AN-17-00032CN.

The Court then invited the undersigned to attend a deposition scheduled that week and provided confidential details to make sure J.P and S.P and their counsel would participate in it.

By allowing J.P and S.P to participate fully in the permanency proceedings with their counsel, the trial court granted J.P and S.P de facto permissive party status. Accordingly, J.P and S.P participated in all related hearings, conferences, and court briefings. On June 11, the trial court considered and ruled on the Petersen's Motions for Expedited Stay of Proceedings and on their Motion for Reconsideration. Although these motions were denied, the trial court's reasoning and the resulting chain of events has directly resulted in this Appeal. Moreover, under Alaska's liberal requirements for standing, J.P and S.P' involvement in J.F.'s life should be enough to confer standing.

D. Even if the case is deemed moot because the Sun'Aq Tribe acquired jurisdiction (it did not), the public interest exception to the mootness doctrine applies.

The public interest exception allows a court to consider certain issues on their merits even though the case itself was rendered moot.[21] This exception is applied based on three main factors: (1) whether the disputed issues are capable of repetition, (2) whether the mootness doctrine, if applied, may cause review of the issues to be repeatedly circumvented, and (3) whether the issues presented are so important to the public interest as to justify overriding the mootness doctrine.[22] This Court recently applied the public interest exception in an ICWA case noting that the placement and

[21] *See Fairbanks Fire Fighters*, 48 F.3d at 1168; *Kodiak Seafood*, 900 P.2d at 1196; *In re Tracy C.*, 249 P.3d at 1090.
[22] *Fairbanks Fire Fighters*, 48 F.3d at 1168.

custody of an Indian child is important to the public interest.[23] Here, all three factors weigh heavily in favor of the Court applying the public interest exception to review the superior court's improper transfer of jurisdiction to the Sun'Aq Tribal Court.

First, this harm is capable of repetition because nothing prevents the Sun'Aq Tribal Court from asserting its jurisdiction in any custody proceeding – and at any point in the proceedings, even at a pre-adoptive phase - involving an Indian child in the future. Courts "interpret a federal statute by ascertaining the intent of Congress and by giving effect to its legislative will. In determining Congress's intent, we must first look to the words of the statute."[24] By ICWA's plain language, Congress intended to grant authority to Indian Tribes to assert jurisdiction over Indian children who are members or eligible for membership in the Tribe—not over all Indian children.[25] However, in this case, the Sun'Aq Tribal Court has unilaterally claimed jurisdiction over a child not a member of the tribe nor eligible for membership. This conduct is in contravention to clear Congressional intent and, barring a decision of this Court stating otherwise, nothing prevents the Sun'Aq Tribe from asserting its authority over any Indian child. Furthermore, if any Indian child can be subjected to this abrupt overtaking of jurisdiction, it would impede the permanent placement process of potentially all Indian children and threaten the stability of Indian children who have secure permanent pre-adoptive placements. In this case, J.F has lived

[23] *Jennifer L. v. State Dept. of Health & Soc. Servs.*, 357 P.3d 110, 114-115 (2015); *accord In re Candace A.*, 332 P.3d 578 (2014) (applying the public interest exception to an ICWA case).
[24] *Confederated Salish and Kootenai Tribes v. U.S. ex rel. Norton*, 343 F.3d 1193, 1196 (9th Cir. 2003) (internal citations omitted).
[25] *See* 25 U.S.C. §§ 1903(4)-(5), 1911(b)-(c), 1914.

with J.P and S.P for 4.5 years – his whole life and everyone approved of the placement. Over two years ago, the Tangirnaq Tribe was notified but never intervened. However, over two years later and 10 days before a pre-adoptive phase permanent placement hearing, the Sun'Aq Tribal Court usurped jurisdiction, held covert hearings, produced no transition for the child before he was sent out of state on a red eye flight and has now jeopardized the continued thriving status of the child. This is a harm capable of repetition.

Second, if the mootness doctrine is applied to this case, the issue in dispute—the improper transfer of jurisdiction from the superior court to the Sun'Aq Tribal Court—will allow this issue to continually evade review. In the July 9, 2021 Order, this Court held that even if the superior court erred by transferring jurisdiction to the Sun'Aq Tribal Court, "neither this court nor the superior court has authority to order the tribal court . . . to transfer jurisdiction of the child's proceeding back to state court." (July 9, 2021 Order 4.) If this is so (and Appellants respectfully contend that it is not, at least in this case), this issue will never be capable of review where, as here, the superior court ruling did not allow time for an appeal. Indeed, the July 9, 2021 Order recognized that under its reasoning, a superior court can insulate its transfer orders against any review by giving them "immediate or near-immediate effect." (*Id.* at 5 n.6.)

Third, the issues presented in this case are so important, that public interest requires the Court to overrule the mootness doctrine. Congress enacted ICWA to "protect the best interests of Indian children and to promote the stability and security of Indian tribes and families by the establishment of minimum Federal standards for the removal of Indian

children from their families[.]"[26] Congress intended for the implementation of ICWA's standards to respond to the "abusive child welfare practices that resulted in the separation of large numbers of Indian children from their families and tribes[.]"[27]

In this case, an Alaskan Native child, J.F., was trafficked across the country under the cover of darkness to live with white half-relative of his estranged father by order of a tribal court that was not his tribe. Presently, J.F. is not in New Mexico, as the Sun'Aq Tribal Court ordered, but in an undisclosed location in Texas. Unfortunately, neither the superior nor tribal court created a transition plan for the matter, and as soon as the superior court denied the foster parents' and Office of Child Services' respective motions, J.F. was swiftly taken out of the hands of his loving foster parents to strangers under coercion from the Anchorage Police Department.

As stated, Sun'Aq Tribal Court was not able to determine the best interests of J.F., nor was it lawful to do so under state and federal law. Instead, an indisputably-unsuitable biological father—with no ties to the Sun'Aq Tribe and with no interest in joining *any* tribe until the state's court system was about to permanently place J.F. in a loving family—circumvented the placement process and obtained a ruling that has caused and will continue to cause irreparable psychological harm to an innocent four-year-old.

If this Court fails to take up this matter on appeal, it will eviscerate the well-established independence of tribal authority as quasi-sovereigns. Importantly, there would

[26] 25 U.S.C. § 1902; *see also Miss. Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 32 (1989); *Adoptive Couple v. Baby Girl*, 570 U.S. 637, 690 (2013).
[27] *Baby Girl*, 570, U.S. at 642.

be nothing to prevent any Indian tribe from asserting its authority and jurisdiction in a child custody proceeding regardless of whether the child has any connection whatsoever to the tribe itself. Though disturbing to consider, this lack of adherence to ICWA's requirements and the Bureau of Indian Affairs' guidelines opens the door to the trafficking of Indian children and to the expectation that in State Proceedings, there will always be the possibility that efforts shall be thwarted because at the last minute, any tribe can intervene. While this idea may appear preposterous, it is not more exaggerated than what occurred here. Surely this is not what Congress intended when it passed ICWA.

There is quite literally no greater public interest than to protect the physical and psychological wellbeing of Alaska's vulnerable children. For these reasons, public interest dictates that the Court should review the issue of whether jurisdiction was improperly transferred to the Sun'Aq Tribal Court.

DATED this 19th day of July 2021.

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